

No. 83-830

Office - Supreme Court, U.S.

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IN THE
Supreme Court of the United States

October Term, 1983

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,

Petitioner,

v.

BOOTHE FINANCIAL CORPORATION,

Respondent.

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO**

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CONSTITUTIONAL AND STATUTORY PROVISIONS

OHIO CONSTITUTION:

ARTICLE I: BILL OF RIGHTS

§ 2 Right to alter, reform, or abolish government, and repeal special privileges.

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly. (See Const 1802, Art VIII, § 1.)

OHIO STATUTES:

Section 5711.22, Revised Code
(As effective for time period at issue)

Rates of assessment for personal property.

Sec. 5711.22. (A) Except as otherwise provided, personal property shall be listed and assessed at seventy per cent of its true value in money on the day that it is required to be listed or on the days or at the times that it is required to be estimated on the average basis. Deposits not taxed at the source shall be listed and assessed at their amount in dollars on the day they are required to be listed. Moneys shall be listed and assessed at the amount thereof in dollars on hand on the day that they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, except as otherwise provided in sections 5711.01 to 5711.36, inclusive, of the Revised Code, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either

division (A) or division (B) of section 5701.06 of the Revised Code which has not been outstanding for the full calendar year next preceding the date of listing, except shares of stock of like kind as other shares of the same corporation outstanding for the full calendar year next preceding the date of listing, or which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at their true value in money on the day that such investments are required to be listed.

Credits and other taxable intangibles shall be listed and assessed at their true value in money on the day as of which the same are required to be listed.

(B) Personal property of a merchant which is required to be returned on the average basis as provided in section 5711.15 of the Revised Code, and personal property as defined in section 5701.03 of the Revised Code used in the business of preparing, serving, and selling food in the form of meals suitable for immediate consumption by the purchaser, shall be listed and assessed as follows:

- (1) In the return filed for the year 1968, at sixty-three per cent;
- (2) In the return filed for the year 1969, at fifty-seven per cent;
- (3) In the return filed for the year 1970, at fifty-two per cent;
- (4) In the returns filed for the years 1971, and thereafter, at fifty per cent.

(C) Personal property, used in business, shall be listed and assessed at fifty per cent of its true value in money on the day that it is required to be listed or on the days or at the time that it is required to be estimated on the average basis as follows:

- (1) All engines, machinery, tools, and implements of a manufacturer mentioned in section 5711.16 of the

Revised Code, and all engines and machinery used or designed to be used in mining, and all tools and implements used or designed to be used for such purpose, excepting as provided in the last paragraph of this section, and all engines, machinery, tools, and implements used in stone plants and gravel plants, and all machinery, implements, and tools used in laundries, towel, and linen supply and dry cleaning plants, and all engines, machinery, tools, implements, and other equipment used in radio and television broadcasting, except as any of the kinds of property mentioned in this division may have been legally regarded as improvements on land and considered in arriving at the value of real property assessed for taxation;

(2) The average value of all articles purchased, received, or otherwise held by a manufacturer for the purpose of being used in manufacturing, combining, rectifying, or refining;

(3) The average value of all articles which were at any time manufactured or changed in any way by the taxpayer, either by combining or rectifying, or refining or adding thereto, but not including finished products unless kept or stored at the place of manufacture or at a warehouse in the same county therewith; provided that finished products not kept or stored at the place of manufacture or at a warehouse in the same county therewith shall be listed and assessed as provided in division (B) of this section.

Boilers, machinery, equipment, and personal property used for the generation or distribution of electricity other than for the use of the person generating or distributing such electricity shall be listed and assessed at its true value in money on the day that it is required to be listed.

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STATEMENT OF THE CASE

This case was initiated by the issuance of an increased personal property tax assessment by the Tax Commissioner of Ohio (hereinafter "Petitioner") against Boothe Financial Corporation (hereinafter "Boothe") for the tax years 1970 and 1971. After the administrative review process was exhausted, a "de novo" hearing on the matter was held before the Ohio Board of Tax Appeals. In that hearing, the only evidence introduced by the parties consisted of two documents. The first of these documents contained Stipulations of Fact documenting a representative transaction wherein Boothe acquired an existing computer installation from IBM in a three-party transaction. The second document introduced into evidence by Boothe,

without objection, was an affidavit from the Director of Excise and Property Tax for the IBM Corporation. The IBM affidavit set forth the true values at which IBM had returned the identical equipment described in the Stipulations and the values at which IBM would have returned the equipment had it retained ownership. In addition, the IBM affidavit set forth the date of manufacture of the equipment involved and the selling price.

As set forth in the Stipulations, most of the equipment owned by Boothe, for the years in question, was purchased by Boothe from IBM in a three-party transaction. In a three-party transaction, a customer of IBM would act as an agent for Boothe to purchase the computer installation which it had been renting from IBM. After the customer had purchased the equipment and turned the title over to Boothe, Boothe would lease the identical equipment back to the customer. Thus title to the equipment was transferred from IBM to Boothe, but *the equipment was not moved or changed in any way.* The transaction involved merely a paper transfer of title. However, as a result of the transfer of title, the Petitioner increased the true value of the equipment in the hands of Boothe approximately six-fold over the true value at which it had assessed the identical equipment in the hands of IBM.

In filing its 1970 and 1971 personal property tax returns, Boothe included a written notice stating that it was returning the IBM computer equipment, of which it was lessor, at a value which it believed approximated the value at which IBM returned such equipment, of which it was lessor. The notice further stated that Boothe believed that IBM returned its computer equipment on the basis of manufacturer's cost as opposed to selling price. In its affidavit, IBM confirmed that it was using manufacturer's cost, less depreciation, as the basis for filing its Ohio personal property tax return.

In the Stipulations, Petitioner admitted that:

If IBM's (manufacturing) cost for computer equipment was different than Boothe's (purchase) cost for similar IBM manufactured equipment, two similar pieces of Schedule 4 equipment leased at the same time to the same customer would be valued by the Department of Taxation for Ohio personal property tax purposes at different true values in the hands of IBM and Boothe, such valuations being based on their respective costs. The Department was aware of this at the time Boothe was assessed for the return years at issue.

The Board of Tax Appeals found for Petitioner, and Boothe appealed to the Ohio Supreme Court. That Court found that the actions of the Petitioner in the matter were intentional and systematic and determined that the actions of Petitioner denied Boothe the "right to equal treatment." The Court ordered that Boothe "be allowed to report the value of its property in the same manner as IBM." The Petitioner's Writ for Certiorari followed.

ARGUMENT

I. THE DECISION OF THE OHIO SUPREME COURT FOLLOWED THE OFTEN-STATED PRINCIPLE ESTABLISHED BY DECISIONS OF THIS COURT THAT ALL MEMBERS OF A CLASS OF TAXPAYERS ARE TO BE TREATED EQUALLY.

In deciding this case, the Ohio Supreme Court, *Boothe Financial Corp. v. Lindley*, 6 Ohio St. 3d 247, 452 N.E. 2d 1295 (1983), relied upon and followed the principle enunciated by this Court that all members of a class of taxpayers should be treated equally. In seeking Certiorari in this matter, the Petitioner continues to seek a judicial sanction for her Department's policy of intentional and systematic discrimination based not on any statutory or constitutional grounds, but merely on a desire for administrative convenience. Petitioner has not cited, nor can she cite, any Ohio statute or provision of the Ohio or United States Constitution which grants authority for her to intentionally and systematically discriminate between taxpayers of the same class. The Petitioner's position in this case is in direct contradiction to this Court's specific holding in *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23 (1931), as stated in Headnote 2:

Discrimination in state *ad valorem* taxation, resulting from intentional, systematic undervaluation of some property as compared with the valuation of other property of the same class *in other ownership*, violates the equal protection clause of the Fourteenth Amendment, even though the property so discriminated against be not assessed higher than its market value, or higher than a percentage of fair market value adopted as a uniform basis in making the assessment. (Emphasis added.)

The *ad valorem* tax at issue in this matter is levied by Section 5711.22 of the Ohio Revised Code, which states:

[P]ersonal property shall be listed and assessed at seventy per cent of its true value in money

Therefore, the only statutory criteria for assessing personal property in Ohio is its "true value in money." In commenting on the meaning of this phrase in its opinion in this case, *Boothe Financial Corp. v. Lindley*, *supra*, the Ohio Supreme Court, quoting from one of its prior opinions, stated:

"In the last analysis, the value or true value in money of any property is the amount for which that property would sell on the open market by a willing seller to a willing buyer. In essence, the value of the property is the amount of money for which it may be exchanged, i.e., the sales price." (Page 248.)

There is no authority in either the Ohio Statutes or the Ohio Constitution for valuation of personal property based upon ownership of the property. To the contrary, true value in money is to be determined under the willing buyer-willing seller formulation cited by the Court. Both IBM and Boothe were required to report the leased equipment under Schedule Four of their Ohio personal property tax returns as personal property used in business, other than manufacturing. There is no statutory or Constitutional basis for classifying taxpayers (i.e., manufacturer-lessor versus non-manufacturer-lessor) listing personal property on Schedule Four. In *Kroger Co. v. Schneider, Tax Comm.*, 9, Ohio St. 2d 80, 88; 223 N.E. 2d 606 (1967), the Ohio Supreme Court stated:

[T]he basic power of taxation stemming from Section 1, Article II [Ohio Constitution] allows personal property to be taxed at the discretion of the General Assembly, limited only by the equal protection clause; and that the equal protection clause requires all property within an enumerated classification that has not been lawfully exempted from taxation to be assessed and taxed at an equal rate.

A comparison of the Ohio cases cited above and this Court's decision in *Cumberland Coal*, *supra*, shows a total

commitment of both Courts to the proposition that all tax payers within a classification must be treated equally.

In contrast to the statutory principle of valuing property at its true value, the Petitioner continues to seek a system of taxation based upon ownership. This Court stated in *Cumberland Coal Co. v. Board of Revision*, *supra*,

[U]ndervaluation of some property as compared with the valuation of other property of the same class in other ownership violates the equal protection clause [Headnote 2.]

However, that is exactly what the Petitioner is seeking to have sanctioned in this case. The Stipulations and the IBM affidavit show absolutely that when IBM owned a piece of equipment, it was taxed at one value; however, when Boothe owned the identical piece of equipment, the value was increased some six-fold. The Stipulations further show and the Court found that the difference in valuation based upon ownership was the intentional policy of Petitioner. This intentional undervaluation of property in the hands of IBM directly violates this Court's decision in *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918), wherein the Court stated:

It must be regarded as settled that systematic undervaluation by state officials of other taxable property in the same class contravenes the Constitutional right of one taxed upon the full value of his property.

Such discrimination was not sanctioned by the Ohio Supreme Court and has never been sanctioned by this Court. The first Syllabus of the Ohio Supreme Court's decision, in this case, *Boothe Financial Corp. v. Lindley*, *supra*, cited and followed this Court's decision in *Southern Railway Co. v. Watts*, 260 U.S. 519 (1923), as follows:

A taxpayer, although assessed at not more than true value, may be unlawfully discriminated against by undervaluation of property of the same class belonging

to others. (*Southern Railway Co. v. Watts*, 260 U.S. 519, *followed*.)

Petitioner presents no compelling reasons why this Court should hear her effort to vindicate this discriminatory treatment. The reasons advanced by taxing authorities to attempt to justify their efforts to discriminate among similarly situated taxpayers vary. Nevertheless, this Court has always held that there must be uniformity in treatment of taxpayers within a class.

II. THERE ARE ADEQUATE STATE GROUNDS TO UPHOLD THE DECISION OF THE OHIO SUPREME COURT WITHOUT CONSIDERATION OF FEDERAL CONSTITUTIONAL PROVISIONS.

This Court will decline to review state court judgments which rest on independent and adequate state grounds, despite the presence of Federal issues. *Fay v. Noia*, 372 U.S. 391 (1963). The decision in this case rests upon independent and adequate state grounds.

The Ohio Supreme Court relied on a combination of prior decisions of this Court and its own decisions on equal protection. The Court footnoted that:

Equal protection is guaranteed by the Fourteenth Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution. (Page 249.)

In *Continental Can Co. v. Donahue, Tax Commr.*, 5 Ohio St. 2d 224; 215 N.E. 2d 400 (1966), the Ohio Supreme Court had before it the question of the State's power to classify personal property for taxation. It held, Syllabus paragraphs 1 and 2:

1. Personal property may be classified for purposes of taxation. Such classification must be reasonable and not arbitrary.

2. Where personal property has been properly classified for tax purposes, all such property *in the same class* must be assessed and taxed in the same manner.

Likewise, in the *Kroger* case, *supra*, the Court held that the equal protection clause of the Ohio Constitution requires that all property within an enumerated classification that has not been exempted from taxation be assessed and taxed at an equal rate. In so holding, the Court struck down the Ohio General Assembly's attempt to impose unequal treatment upon taxpayers in the same class.

In this case, the equipment of both IBM and Boothe is in the same classification. There is no state statutory or Constitutional basis for treating IBM and Boothe differently. The violation of the Ohio equal protection guarantees results from Petitioner's application of the statutes. It is the Petitioner, not the Ohio General Assembly, who has attempted to allocate the tax burden on the basis of ownership and not true value. In short, Petitioner has used the difference in ownership as the basis for unequal treatment and thus attempted to create two classes of taxpayers owning the same property where by law only one exists. If the Ohio General Assembly is prohibited by imposing unequal treatment upon taxpayers in the same class, surely the Tax Commissioner may not, on her own, create such a classification for assessment purposes.

Petitioner ignores the fact that the Ohio Supreme Court has always held that market value rather than cost is to be taken as true value. In *Willard Storage Battery Co. v. Peck, Tax Commr.*, 161 Ohio St. 197, 200; 118 N.E. 2d 514 (1954), the Ohio Supreme Court chided the Tax Commissioner and the Board of Tax Appeals for attempting to establish by administrative license that cost is to be taken as true value:

The Tax Commissioner and the Board of Tax Appeals cannot dispose of the problem of valuation of the taxpayer's personal property by merely saying or ruling

that the book value resulting from the application of the cost price must be taken as true value.

The philosophy of the decision of the Ohio Supreme Court as regards equal protection in the field of taxation was best set forth in *Kroger, supra*, as follows:

The entire evolution of the taxing power since the adoption of the Constitution of 1851 has contained the basic premise that any discrimination should be eliminated from taxation. (Page 87.)

It is in the face of these clear pronouncements of the Ohio Supreme Court that Petitioner continues her relentless pursuit of administrative convenience at the expense of equal protection — equal protection under Section 2, Article I of the Ohio Constitution, as well as the Fourteenth Amendment to the Federal Constitution.

The Petitioner has not cited any statute that provides for the classification which she has attempted to make under the facts of this case. Furthermore, the Petitioner has not been given any authority to classify.

Thus there exist adequate and well defined State statutory and Constitutional provisions to sustain the Ohio Supreme Court's decision in this matter without resort to any Federal Constitutional provision in keeping with this Court's declaration in *Fay, supra*.

III. THE CASES CITED BY PETITIONER ARE NOT RELEVANT TO THIS CASE.

There is no dispute that IBM and Boothe are members of the same class of taxpayers. Both are required under Ohio law to return the property in question on the same schedule for taxation as personal property used in business other than manufacturing. The Petitioner has attempted to classify IBM as a manufacturer-lessor and Boothe as a non-manufacturer-lessor; however, no basis for such classification exists in the Ohio statutes, and neither the Federal nor the Ohio Constitution will permit such

classification. The distinction upon which the Petitioner dwells is merely an arbitrary classification which has been invented for purposes of this case.

The Petitioner attempts to argue that she has a right to classify taxpayers, when in fact she has not been delegated authority to make any such classification. Petitioner ultimately is asking this Court to grant her a power to classify which was not granted her by the Ohio General Assembly and which was denied her by the Ohio Supreme Court.

The decisions of this Court cited by Petitioner are not relevant to the facts of this case. The quotation from *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), related to a question of classification. It did not relate to discriminatory treatment of members within the same class. Likewise, in *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930), *Lenhausen v. Lake Shore Auto Parts Co., et al.*, 410 U.S. 356 (1973), and *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), the Court considered questions relating to establishment of classifications for purposes of taxation.

These cases give the States great latitude in establishing classifications for taxation; they do not deal with unequal treatment of taxpayers within a class. Furthermore, the cases concerned questions of classification made by legislative authority, not arbitrary classifications made by administrators acting with no legislative authority and in violation of the State Supreme Court's commands. In this case, there is absolutely no issue of classification, even though the Petitioner continues to attempt to create one. Based on the fact that IBM and Boothe are members of the same class, this case presents only a question of equal treatment of members of the same class, and, on that question, this Court and the Ohio Supreme Court agree that members of the same class must be treated equally.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Ohio was sent this day of December, 1983 postage prepaid to James C. Sauer, Assistant Attorney General, 30 East Broad Street, Columbus, Ohio 43215, Counsel for Petitioner. I further certify that all parties required to be served have been served.

SAMUEL H. PORTER

Counsel for Respondent